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JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

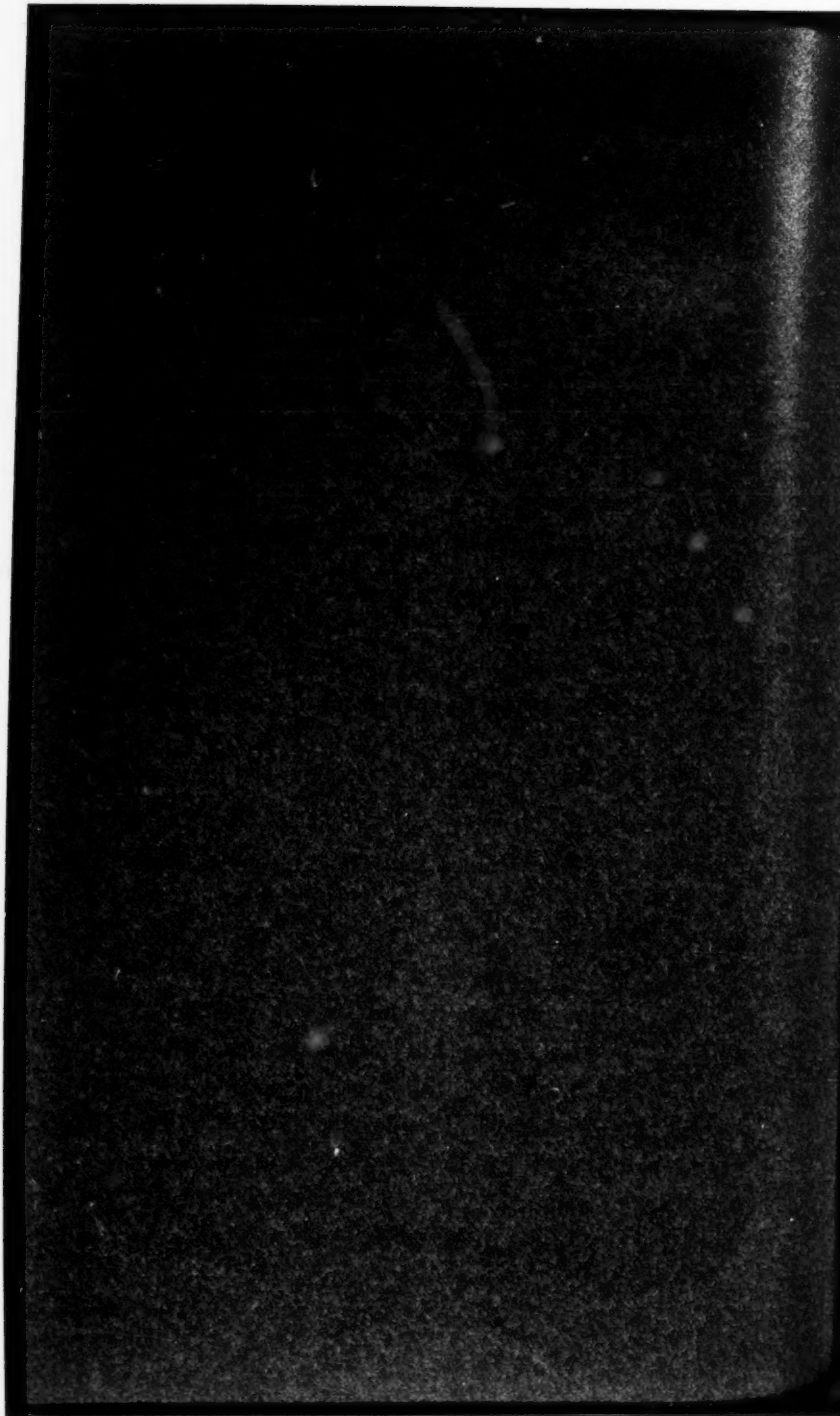
OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
JOHN SMITH.
No. 184.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

LOUIS A. FRANT,
Assistant Attorney-General.



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REPLY BRIEF FOR APPELLANT.

At this late day it is contended for the first time, on behalf of the claimant, that the court martial in this case was without jurisdiction because convened in violation of the inhibition of article 38 of the Articles for the Government of the Navy, that no commander of a fleet or squadron in the waters of the United States shall convene a general court-martial without express authority from the President. In the light of the facts surrounding the convening of this court-martial it is perfectly evident that this objection is absolutely technical and has no foundation whatever upon the plain spirit and intent of the article invoked. This court-martial was convened at Cavite, P. I., June 30, 1899. At the time there was probably no spot at which a fleet or squadron of the United States Navy was or could be assembled, more remote from the President of the United States. Less than three months before, those waters were foreign. At the

time that the court-martial was convened they were the waters, to be sure, of territory of the United States, but territory which was rife with insurrection against the authority of the United States and overrun with the armed forces of that insurrection. Every substantial reason for the convening of the court-martial by the commander of the fleet without express authority from the President existed then that would have existed if it had been convened three months earlier; nor was it called in ignorance of the provisions of article 38, but with express reference to and upon the authority of that article. Its action was ratified by the Secretary of the Navy with full knowledge, of course, that it had been convened without such authority of the President. And the question now raised by the claimant is whether such action of the commander of the fleet and of the Navy Department is to be sustained by this court as being in substantial compliance with the spirit and purpose of article 38, or whether that action is to be declared null and void for lack of the express authority of the President.

I have no hesitation in asserting that this court will not so declare unless there is no escape from the conclusion that the waters of Cavite were at the time *waters of the United States* within the unequivocal meaning of those words as employed in article 38. To my mind it is clear that they were not.

This article was enacted in 1862 at a time when the "waters of the United States" were purely continental and the phrase then meant home waters as contradistinguished from waters beyond seas. The reason for

the enactment is obvious. It gave, by implication, to the commander of a fleet or squadron, as a matter of convenience, and indeed at times of necessity, the right to convene a court-martial when outside of those waters of the immediate shores of the United States from which the President could be conveniently reached, but reserved that right as an exercise of high prerogative to the President in cases where such practical considerations were not involved. These are facts which we have a right to consider in a case like this, where the meaning of the language of the statute is involved. In *Smith* v. *Townsend* (148 U. S., 494–495), Mr. Justice Brewer makes the following quotation most pertinent to this case:

> In endeavoring to ascertain what the Congress of 1862 intended we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances. (*Platt* v. *The Union Pac. R. R.*, 99 U. S., 64.)

In the case of *Hadden* v. *Collector* (5th Wallace, pp. 112–113) this court held that the term "beyond the Cape of Good Hope" was descriptive of the locality of countries with reference to the position of the lawmakers at the National Capital, and hence would apply to imports brought into the port of San Francisco from Persia, although with reference to San Francisco, Persia is not beyond the Cape of Good Hope. There seems to be equal reason in this case to hold that the phrase "waters of the United States" in

article 38 refers to what were then the waters of the United States, or waters of territory immediately adjoining the United States as then constituted which might be thereafter added to it, and should not be now construed to mean waters of subsequently acquired possessions of the United States lying thousands of miles away from the nearest shores of the United States as then constituted. And this is the view which Congress has taken of what may be called another aspect of this question.

The act of May 26, 1900, provided for a 10 per cent increase of the pay of officers serving in Porto Rico, Cuba, Philippine Islands, Hawaii, and the Territory of Alaska above their pay proper. Congress in making appropriation, March 2, 1901, for this increased pay did so in the following language: "For additional 10 per centum increase of pay of officers serving at foreign stations" (31 Stat. L., p. 903), and similar language was employed in the army appropriation acts of June 30, 1902 (32 Stat. L., p. 507), and March 2, 1903 (32 Stat. L., p. 933).

A similar question was raised in the case of *William M. Irwin* v. *The United States* (38 C. Cls. R., p. 87). In that case the court had before it for construction the phrase "beyond seas" in the *further proviso* of section 13 of the navy personnel act, which reads:

> That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places.

The court held that the act of May 26, 1900, providing for a 10 per cent increase of the pay of officers of the Army serving in our island possessions and the Territory of Alaska above their pay proper, taken in connection with the proviso above cited, operated to the like benefit of officers of the Navy detailed for shore duty in our island possessions and the Territory of Alaska. In so holding the court construed the words "beyond seas" to include the waters of our island possessions and of Alaska, thereby overruling the construction of the Comptroller of the Treasury that the phrase applied only to foreign waters. In delivering the opinion of the court Mr. Justice Howry said:

> It does not seem to us reasonable to say that Congress intended to give this increase to naval officers serving in Cuba, at our very doors, and to withhold it from those serving thousands of miles off in the Philippine Islands (p. 99).

Paraphrasing this language, it may be said with equal force in this case that Congress did not intend by article 38 any such incongruity as that a commander of a United States fleet in the waters of Cuba should have the power to convene a general court-martial denied to a commander of a fleet in the waters of Guam or the Philippines. The same view is expressed by this court in the case of the *United States* v. *Thomas* (195, U. S., p. 418), in which Mr. Justice Brown, speaking for the court, after quoting the act of May 26, 1900, above referred to, said:

> Here is an increase of 10 per cent allowed to

> army officers serving in certain designated places. Doubtless if naval officers were detailed for shore duty in any of these islands, they would receive a like increase of pay, under the proviso of section 13 of the personnel act heretofore quoted.

But finally, the case of *Downes* v. *Bidwell* (182 U. S., 244) seems to effectually dispose of this contention by deciding that the island of Porto Rico is not a part of the United States within that provision of the Constitution which declares that all duties, imposts, and excises shall be uniform throughout the United States. In delivering the majority opinion of the court in this case, Mr. Justice Brown, referring to the articles of Confederation, the act creating the northwest territory, and the Constitution of the United States, said:

> It is sufficient to observe in relation to these three fundamental instruments that it can nowhere be inferred that the territories were considered a part of the United States.

If our island possessions are not a part of the United States within the meaning of the uniformity provision of the Constitution, *a fortiori* their waters are not waters of the United States within the meaning of article 38, especially when to extend to them the inhibition of article 38 would be to subvert the very spirit and purpose of that article.

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